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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

WILLIAM GRAHAM  
KELSBERG,

Plaintiff and Respondent,

v.

JAMES D. STONE et al.,

Defendants and  
Appellants.

B289283

(Los Angeles County  
Super. Ct. No. BC674281)

APPEAL from an order of the Superior Court of Los Angeles County, Elizabeth Allen White, Judge. Affirmed.

James D. Stone, in pro. per., for Defendants and Appellants.

Hamrick & Evans, A. Raymond Hamrick III, and Neer Lerner for Plaintiff and Respondent.

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James Stone appeals from a trial court order denying as untimely under Code of Civil Procedure section 425.16, subdivision (f) his anti-SLAPP special motion to strike.<sup>1</sup> Because Stone has not demonstrated that the trial court abused its discretion when it denied the motion as untimely, we affirm.

### **BACKGROUND**

William Kelsberg, an attorney, retained Stone, a private investigator, and the JD Stone Agency to perform various services in support of Kelsberg's litigation practice. After a dispute about one of Stone's invoices, Stone posted a review of Kelsberg's law firm on the internet that named Kelsberg and referred to him as a "liar and a thief."

On August 30, 2017, Kelsberg filed suit against Stone and the JD Stone Agency alleging, at the very least, that Stone had defamed Kelsberg.<sup>2</sup> Kelsberg served the summons and complaint by substituted service at Stone's business address on September 8, 2017.<sup>3</sup> On November 13, 2017, Stone filed a request for a fee

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<sup>1</sup> Statutory references are to the Code of Civil Procedure.

<sup>2</sup> The complaint is not in the record on appeal. The parties' trial court briefing, however, discusses a defamation cause of action.

<sup>3</sup> The affidavit of due diligence accompanying the proof of service states that the process server attempted personal service at the same address on September 6, September 7, and September 8, 2017. The business address used by Stone and JD Stone Agency was a box rented from a UPS Store. The address upon which personal service was attempted and substituted service was effected is the same address Stone listed as his address of record on documents he filed in the trial court.

waiver in the trial court, which was granted on December 5, 2017.

Stone filed a special motion to strike under the Anti-SLAPP Law on January 3, 2018. At a hearing on February 27, 2018, the trial court denied the motion as untimely. Stone filed a timely notice of appeal.

## **DISCUSSION**

### **A. Stone's Anti-SLAPP motion was untimely**

A special motion to strike under California's Anti-SLAPP Law "may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms [the court] deems proper." (§ 425.16, subd. (f).) Stone contends that his motion was timely because service of the complaint was never effected in this case. "[S]ubstitute[d] service is only employed after diligent efforts to effect personal service are made to no avail," Stone argues. Because all of the efforts to personally serve Stone were made "at a private mail box business" and not at Stone's residence, service was invalid.

We disagree with Stone's analysis for two reasons. First, Stone's argument is an improper collateral attack on the trial court's jurisdiction. If Stone had wished to challenge service, he was entitled to file a motion to quash under section 418.10. He did not do so.

Second, even if an anti-SLAPP special motion to strike were an appropriate means of attacking service of process, the record here establishes effective substituted service. In *Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1198 (*Hearn*), the process server "made three attempts to personally serve appellant on July 27, July 30 and August 2, 2007. During the first attempt, [the process server] learned that the address was a post office box

rental store. During each attempt, the store clerk declined to confirm that appellant rented a post office box there. During the third attempt, [the process server] left the documents—including the summons and complaint—with the store clerk . . . . Also on August 2, 2007, [the process server] mailed copies of the documents to appellant at the same address. According to a proof of service of summons filed on August 29, 2007, [the process server] averred that he effected substituted service by these means.” (*Ibid.*) The process server “attempted to personally serve appellant at the business address on her letterhead and reported by the California State Bar by appearing at that address on three separate occasions on three different days.” (*Id.* at p. 1202.) That was sufficient to effect substituted service under section 415.20, subdivision (b). (*Hearn*, at p. 1202.)

Here, the process server attempted to personally serve Stone at his business address (that he continued to use on pleadings he filed in the trial court) by appearing at that address on three separate occasions on three different days. Under section 415.20, subdivision (b), the September 8, 2017 substituted service was deemed complete on September 18, 2017. An anti-SLAPP special motion to strike filed after November 17, 2017, therefore, would be untimely. (§ 425.16, subd. (f).)

**B. The trial court did not abuse its discretion when it denied Stone’s anti-SLAPP motion as untimely**

“A court ‘enjoys considerable discretion’ in determining ‘whether to allow [a] late filing of an anti-SLAPP motion.’ [Citation.] However, the court must exercise this discretion consistent with the purposes of the statute and must be mindful that the 60-day deadline is the general rule.” (*San Diegans for Open Government v. Har Construction, Inc.* (2015) 240

Cal.App.4th 611, 624.) “In determining whether to permit a late motion, the most important consideration is whether the filing advances the anti-SLAPP statute’s purpose of examining the merits of covered lawsuits in the early stages of the proceedings. [Citations.] Other relevant factors include the length of the delay, the reasons for the late filing, and any undue prejudice to the plaintiff.” (*Ibid.*)

Stone did not request leave of court to file an untimely anti-SLAPP special motion to strike. Neither Stone’s memorandum of points and authorities nor the declaration he filed in support of his motion address any of the factors the trial court might have considered in making a determination whether to accept the untimely motion. In his trial court reply memorandum, Stone contended that he was “never served,” and that the trial court “did not have jurisdiction over Stone until he filed his [s]pecial [m]otion to [s]trike,” but still failed to address any of the relevant factors the trial court might have considered to determine whether to accept an untimely motion.

“The trial court’s ‘discretion is only abused where there is a clear showing [it] exceeded the bounds of reason, all of the circumstances being considered.’” (*Kunysz v. Sandler* (2007) 146 Cal.App.4th 1540, 1543.) Under the circumstances here, where Stone made no request to file an untimely motion and based his entire argument on an incorrect legal theory, we find no abuse of discretion.

**DISPOSITION**

The trial court's order is affirmed. Respondent is entitled to costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

LEIS, J.\*

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.